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Supreme Court of the United States

October Term, 1976

No. 76-266

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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For the Sixth Circuit

Petitioner respectfully prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review a final judgment of that Court.

OPINIONS AND ORDERS BELOW

The United States District Court for the Northern District of Ohio, Eastern Division, issued its Order (Appendix A) and Judgment Entry (Appendix B) on July 2, 1975. The United States Court of Appeals for the Sixth Circuit issued its Order (Appendix C) affirming the judg-

ment below on April 15, 1976 and issued its Order (Appendix D) denying the petition for rehearing on May 27, 1976.

JURISDICTION

1. The United States Court of Appeals for the Sixth Circuit issued a judgment on April 15, 1976 and issued its order denying the petition for rehearing on May 27, 1976. The jurisdiction of this Court is invoked pursuant to Title 28 U. S. Code Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does a judge have an obligation to complete a trial he undertakes and is able to complete and has no reason for refusing to complete?

2. Does the deliberate refusal, without cause or explanation, of a judge to complete a trial hearing which he has started and is able to complete, constitute a denial of due process or equal protection of law?

3. Is there such a concept in American jurisprudence as "switching judges in midstream" of a trial, particularly where the judge is the finder of fact?

4. Can imprisonment be legally ordered where it is based on a purported "judgment" containing jurisdictional statements known to be false by the attorney who prepared and signed, and by the referee who signed, the "judgment" and who thereby caused a judge to issue such "judgment"?

The answers to these questions are self-evident. Respondents' behavior is outrageous and almost incredible; and no honest and reasonable person can countenance the conduct implied in the questions presented.

CONSTITUTIONAL PROVISIONS INVOLVED

Article Six (Supremacy Clause), United States Constitution:

> ". . . This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding . . ."

Fifth Amendment, United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Fourteenth Amendment, United States Constitution:

> "Section I: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Nature of Case and Disposition by Courts Below

This case arises (a) directly under the due process and equal protection clauses of the Constitution and (b) under the Civil Rights Act (42 U.S.C. Sec. 1983). The District Court's jurisdiction is based, *inter alia*, on 28 U.S.C. Sec. 1331. Damages, a permanent injunction, and any other appropriate remedy are sought. The case involves a "case within a case", so to speak, since it challenges the validity of actions taken by state court officials in a state court action.

The Complaint charged that a state court judge and a state court referee acted without jurisdiction in separate instances, with the result that *purported*, but not valid, "judgments" were entered against Petitioner (defendant in the state court). The Complaint further charged that an attorney, acting as an officer of the court, prepared one of the "judgments" and included therein false statements relating to the referee's jurisdiction; and that the attorney also prepared the other "judgment" knowing the state court judge did not have jurisdiction to issue it.

The Respondent state court judge is attempting to hold Petitioner in contempt of a supposed prior "judgment", even though the original trial judge, after starting the trial and hearing five days of testimony, simply abandoned the case and refused to complete it. The original trial judge never issued a final judgment or made any adjudication of the merits; and the case was never transferred to any other judge. *Thus, no judgment exists for the Respondent judge (Judge Zurz) to enforce.*

The lack of jurisdiction of the referee in the other instance is because the interlocutory matters he undertook to rule on had never been referred to him, although the "judgment" entered as the result of the referee's recommendations *falsely recited* that said matters had been "duly assigned" to him. As a result of the falsely-based interlocutory "judgment" (which itself was never enforced) the Respondent state judge (Judge Zurz) ordered that Petitioner be jailed.

Judge Contie of the United States District Court treated a Motion to Dismiss, filed by Respondents, as one for summary judgment and granted same (Appendix A). Although he found that Judge Koledin refused to complete the trial and "may have had a duty" to do so, Judge

Contie's Order appears to be based on an assumption that the state judge (Zurz) and referee (Pike) were acting within their jurisdiction so as to give them immunity from damages; and that the attorney was not acting "under color of state law" as referred to in Sec. 1983. Judge Contie demurred on the question of an injunction.

The United States Court of Appeals found, *contrary to fact*, that a state appeals court had determined that there was ". . . an irregular but harmless transfer . . ." of the case in mid-trial. The Court of Appeals decided, without any rationale, that no constitutional deprivation occurred (Appendix C). It denied a petition for rehearing, without elucidation (Appendix D).

II. Relevant Facts

The underlying state case, *Griffin v. Griffin*, was docketed as No. 282105 in the Summit County, Ohio, Court of Common Pleas. Testimony began on February 3, 1971 before the domestic relations judge, Judge Sam Koledin. On February 12, 1971, after hearing 5 days of testimony but before the trial was completed, Judge Koledin recessed the trial, giving no reason on the record. (Months later he claimed he had become ill and that this was the reason for the recess. However, this claim conflicts with the reasons given informally on February 12.)

Judge Koledin was away from his office for about 4 weeks from February 12 but returned to his judicial duties sometime in late March or early April, 1971. Upon his return, he conducted other trials but refused to complete the trial of Case No. 282105.

If Judge Koledin could be thought to have overlooked the case, it was brought repeatedly to his attention by various motions and other documents filed in the case dur-

ing the Spring and Summer, 1971. In particular, Petitioner, desperately trying to get the case off dead center, filed a Motion to Dismiss on July 28, 1971.

At no time did the plaintiff therein ask Judge Koledin to complete the trial.

No hearing was held in Case No. 282105 between February 12, 1971 and October 21, 1971 despite Judge Koledin's availability from April on. On October 21 he did resume the trial, thus recognizing his responsibility therefor—but he heard no testimony. Instead, on that date he merely heard brief argument on various motions then pending before him. He again recessed the trial, this time without giving any reason either on or off the record, and thereafter he refused to complete it.

On November 9, 1971 Judge Koledin issued a Finding (*not* an Order, as Judge Contie stated) in which he indicated he would issue a "judgment" setting aside the trial testimony already given and ordering a new trial. On December 3, 1971 Judge Koledin issued an interlocutory "judgment" in which he denied Petitioner's Motion to Dismiss, ruled on some other matters, and then concluded with the following pronouncement:

> "The Court further orders *on its own motion* that a new trial be granted in this cause and that the same be set for trial on December 13, 1971." [Emphasis supplied.]

This purported order for a new trial was clearly fraudulent and was later declared by the state appeals court to be void and "without legal import."!!

Judge Koledin took no further action in Case No. 282105 (except for two supplementary and interlocutory matters not relevant here, both dated December 7, 1971)

but continued to try other cases until his resignation from the bench in January, 1974.

At no time did Judge Koledin or anyone else give any reasons for (a) his refusal to complete the trial although he was able to do so, or (b) his attempt to order a new trial when it was obvious to him, to plaintiff's counsel (Respondent Calhoun herein), and to the second judge who purported to intervene, that a new trial could not be ordered. No legitimate reasons *could* be advanced; and any reasons which might be offered by Respondents can easily be shown to be false.

There were of course reasons for Judge Koledin's behavior—dishonorable reasons. Petitioner has evidence to show that Judge Koledin advised plaintiff's attorney Calhoun that he had not made out a *prima facie* case; that he (Judge Koledin) nonetheless agreed to leave the trial in recess so as to harass and coerce Petitioner into agreeing to a divorce; that during the Summer, 1971 while he was refusing to resume the trial Judge Koledin issued an interlocutory judgment against Petitioner; that (when harassment failed) Judge Koledin, some nine months after he had recessed the trial, issued his fraudulent and void "order" for a "new trial" *as a naked threat* of an unending, or perpetual, trial. For if the original trial was not to be completed, what was the likelihood that he, or anyone, would complete a "new trial"?

Also during this period of deliberate delay and harassment (and while, it might be noted, Petitioner was without counsel), Respondent Attorney Calhoun prepared and signed his approval of, and Respondent Referee Pike signed his approval of, a purported interlocutory judgment which falsely recited that there had been a court session, that Petitioner was "present in person in Court" (when there was no court at which to be present) and that

certain matters had been "duly assigned and submitted for hearing before a Referee." The falsity of these assertions was known by both these Respondents, who nevertheless submitted the proposed judgment to Judge Swaim who signed it (also of course without notice or hearing) ordering Petitioner to jail!

Clearly, had there been any merit to the case, Judge Koledin would have been asked to resume, and would have resumed, the trial in the Spring of 1971. He never did adjudicate the merits of the case or issue a final judgment.

At no time was the case, or trial, transferred to any other judge. The state courts never claimed there was a transfer; and statements by the federal courts to the contrary are entirely inaccurate.[1]

At no time was Judge Koledin's supposed illness a factor in his conduct. Even if he was ill as claimed, he admitted that he returned to his judicial duties within 4 weeks after February 12, 1971. It is his *subsequent* refusal to complete the trial, which he was perfectly able to do as shown by his participation in this and numerous other cases, of which Petitioner complains.

III. Conclusions From the Relevant Facts

Judge Koledin started the trial and was able to finish it but refused to do so, giving no reason. The case was never transferred to any other judge. It would seem apparent that *the trial has never been completed; and therefore Petitioner ought to be entitled to an injunction, at*

1. No order, or even purported order, transferring the case was made. There is no rational or logical way there could be a transfer in mid-trial—any more than there could be a "new trial" in mid-trial. Even if there were an attempt to order a transfer, therefore, it could have no validity.

least, against any purported orders based on the faulty assumption that there was ever a completed hearing. Thus, there is no final judgment or adjudication of the issues in the case which can be enforced by Respondent Judge Zurz or of which Petitioner can be in contempt. Respondents' efforts to deprive Petitioner of both liberty and property are clearly in the absence, not only of due process, but of any process at all.

It is *legally and conceptually* impossible for a "new trial", or any kind of hearing, to be conducted by anyone other than the orginal judge if he is able—particularly where the "new trial" can be based only on an order which the state courts have admitted was "without legal import." Thus, nothing which has occurred at the state level since December 3, 1971, the date of the void order, can have any legal import;[2] and the trial remains today as it was then—in midst of hearing and still uncompleted. However, Petitioner will refer to certain later events which he believes were *ultra vires* and null and void, but on which Respondents and the lower courts rely in their view of due process. By any rational logic, even these later events support Petitioner's position!

IV. Some Later Facts, but Which Are Not Relevant

a. When is a "new trial" not a new trial?!

On December 13, 1971, on the strength of the purported order for a "new trial", a second judge, one C. L. Swaim, purported to conduct a new trial, to which Petitioner of course objected *in toto*. Judge Swaim had no authorization, or even any purported authorization, to in-

2. Thus, in Petitioner's view his "appeal" to the state court of appeals, and its opinion and "judgment" are void and without legal effect. Excerpts therefrom are quoted in this Petition—but the full opinion is not included because it is not a valid document; since no appeal can be made until a trial court issues a judgment, an event which has not yet occurred.

tervene in any way in the trial. (Petitioner declined to submit his defense to Judge Swaim, believing he was entitled to a completed hearing and decision from the original judge who was still able and available and actually hearing another case that very day.) Nevertheless, some 10 months later (more harassing delay) Judge Swaim issued a purported "judgment" adverse to Petitioner.

While reserving his position that Judge Swaim's "judgment" was null and void, Petitioner tried to use orderly process of law (although nobody else was doing so). Therefore, he filed a notice of appeal from the purported "judgment". The state court of appeals *agreed* with Petitioner that as of December 3, 1971 (the date of the purported "new trial" order) "the trial of the case had not been completed" and that a new trial could not be ordered before the original trial *was* completed. It dealt with the purported order as follows:

> "The second issue that we address ourselves to is the significance of the order of Judge Koledin dated December 3, 1971 . . ."

The Ohio court found this order void and so stated at least 4 times, saying:

> "Thus, what significance can be attached to the language, 'a new trial be granted'? What is the legal result of that language? The answer is 'none'."
>
> *and*
>
> "A new trial cannot be ordered until an adverse judgment is of record."
>
> *and*
>
> ". . . it is *obvious* that a new trial could not be granted as there was not an adverse order upon which such a second order could be predicated."

and

> "We agree that the part of the order of Judge Koledin of December 3, 1971 was *without legal import.*" [Emphasis supplied.]

b. "Switching judges in midstream" of a single trial

Notwithstanding their agreement with Petitioner that Judge Koledin could not *and did not* order a new trial (*which logically left the trial still before him*), the state appeals court engaged in a dishonest *non sequitur* and created the unheard-of "concept" of "switching judges in midstream." The court said that it wasn't a new trial after all; but instead there was a continuation of the original trial and "Judge Swaim sat in place of Judge Koledin"! The state court then took the position that this was "harmless error". To reach this conclusion it had to falsify again, by claiming that Petitioner had stipulated that the testimony presented before Judge Koledin be presented to Judge Swaim. *That was not the stipulation.*

In truth, after Petitioner stated to Judge Swaim on December 13, 1971 when he proposed to conduct the "new trial",

> "I consider everything that transpires under Your Honor will have to be void and nullified." [sic],

and after Judge Swaim proposed to repeat the five days of testimony heard by Judge Koledin, Petitioner agreed to the following:

> ". . . a transcript of the *previous trial* shall be prepared and filed with the Clerk and that this Court will consider the same as evidence. . ." [Emphasis supplied.]

Six points should be mentioned here:

1—as the state court of appeals correctly noted, Petitioner "objected to the switch in judges . . ." Having so objected, obviously Petitioner did not agree to submit any part of the case to the second judge;

2—since the court of appeals had held that there was no previous trial, but instead a continuation of a single trial, their own opinion voided the stipulation which referred to the "previous trial";

3—the transcript was to be filed with the Clerk and was to be used by the "Court", not Judge Swaim;

4—if the "proceeding" before Judge Swaim was void (and the only authority was the "new trial" order which the court agreed was authority for nothing), then a stipulation made in a void proceeding was itself void;

5—even if the stipulation is thought to have been a submission to Judge Swaim, it could not confer jurisdiction on him; since jurisdiction cannot be conferred by the parties but must exist prior to the start of the "proceeding";

6—if the "proceeding" before Judge Swaim is deemed to be a continuation of the one and only trial, there would be no point or purpose to a stipulation of any sort relating to any prior testimony—*since that testimony would already be a part of the record!*

Clearly, the stipulation was entered into to avoid the senseless repetition of testimony in a "proceeding" which at the time threatened to be perpetual or unending; for if Judge Koledin wasn't going to finish the trial, what was the likelihood that Judge Swaim would complete his "new trial"? The transcript was of course *available* to Judge Swaim, just as it was available to any citizen; but that does not mean he was authorized to hear the case.

Thus, the state appeals court reached its predetermined result by *non sequitur*, creation of a "concept" unknown to the law, and falsification.

The Ohio Supreme Court refused to hear the matter, holding that "no substantial constitutional question exists herein." (*Quaere*, aren't all constitutional questions substantial?)

The Supreme Court of the United States denied Petitioner's petition for certiorari (No. 73-1853). The report of the action in a reporting service suggests that the Court was under the impression that a second judge had been assigned to complete the trial *during* Judge Koledin's "illness", and *because* of such "illness"—a mistaken impression. In any event, as will be shown in the *Sheppard* case, *infra*, this Court has granted certiorari after having previously rejected it on the identical facts.

Judge Zurz then issued his "judgment" ordering Petitioner to pay money and to be jailed; whereupon Petitioner instituted the instant action.

REASONS FOR GRANTING THE WRIT

1. Departure From the Accepted and Usual Course of Judicial Proceedings Impels This Court's Intervention.

In only one other reported American case has a judge failed to complete a trial he started and was able to finish—and this was of course held violative of due process. That case, by coincidence another Ohio case, *Sharp v. Bryan*, 119 Ohio App. 459, 200 N.E.2d 702 (1963), was a jury case, in which the original judge almost inadvertently abandoned the case after the jury retired but before it rendered

a verdict. As luck would have it, the jury emerged for instructions, which were given by a second judge. The Ohio court said, at page 704:

> ". . . we are of the opinion that the trial, once undertaken by the judge, should be attended to its final determination and conclusion. Moving on to another assignment before such time is not an excusable expediency as against the right of litigants to a fair and completed trial under due process of law."

Where, as here, there was no jury, but rather the judge was the trier of the facts, responsible for evaluating the demeanor and credibility of witnesses, due process and normal procedure require the original judge to complete the trial where he can do so.

The sanctioning by a federal court of appeals of a judge's refusal to complete a trial and the court's conclusion that there was no denial of due process in such refusal constitute approval of a truly amazing departure from the accepted course of judicial proceedings and call for this Court to intervene, per its Rule 19-1 (b).

2. "Switching Judges in Midstream" of a Trial Is a Novel Concept, If It Is a Concept At All, the Propriety and Logic of Which This Court Has Not Decided.

"Switching judges in midstream" of a trial is a concept (if it is a concept) unknown to law, an obvious violation of due process and destructive of any conceivable system of jurisprudence. It was invented by the state appeals court to cover up fraudulent conduct of the trial judge. The court knew, for a number of reasons and clear precedent in Ohio law, that it could not justify the attempted order for a new trial in the midst of the original trial.

So, while conceding that that order was "without legal import", it engaged in its own brand of fraud by asserting that there had been a continuation of a single trial and a "switching judges in midstream".

How can there be two different triers of fact in the same trial? If that is permitted, there is no limit to the number of times there could be "switching judges" during a single trial.

Has anyone ever heard of switching juries, or even a single juror, in mid-trial? If an original juror becomes disabled, an alternate may join the panel; but that alternate is a person who has attended the trial from its inception. A judge who is also the fact finder is comparable to a juror in that respect.

If there can be a switching of judges mid-trial, without any order and without any reason, *how do you ever finish a trial? How does a litigant know to which judge he should present his evidence*—inasmuch as there is no way to know which judge may deign to end the trial and issue a judgment?

Which judge is supposed to issue the judgment in a case where there has been a switch of judges mid-trial?

It must be clear to any rational person that there is no viable system of jurisprudence left in Ohio where judges are permitted to abandon cases without cause and where switching of judges is permitted. This Court has not had occasion to pass on this issue for the simple reason that no one has had the sheer gall, until now, to assert such arrant, and arrogant, nonsense.

Not only are the decisions below repugnant to common sense and elementary logic, they are in conflict with the little precedent extant. Ohio itself has condemned

"switching judges". Besides the *Sharp* case, *supra*, there is the staff note to Ohio Civil Rule 63 which clearly states:

> ". . . one judge may not replace another judge during the middle of an actual trial . . ."

Again, the leading Ohio text states:

> "A litigant has the absolute right to have the case tried before the judge duly chosen to discharge the judicial function of the court." *Judges*, 31 OHIO JUR. 2d 31.

This Court ought to disabuse judges of the notion that "switching judges" in mid-trial is compatible with due process. *"Switching judges" without reason can never be harmless error, for it constitutes a jurisdictional defect.*

3. The Integrity of State and Federal Courts, As Well As Fundamental Considerations of Due Process and Equal Protection, Beckon This Court to Review This Case.

Refusal to complete a trial, and attempting to order a new trial before the trial is completed, is *insane* behavior if done innocently. Done deliberately, as it was here, in order to exhaust Petitioner in a groundless lawsuit, it is diabolical and criminal.

The intervention, without authority and as a mere volunteer, by the second judge who purported to conduct a new trial but whose activity later was labelled instead a continuation of the trial started by the first judge, was an example of unparalleled judicial arrogance. Logically, it makes a shambles of any purported due process proceeding.

Ordering a person to jail, based on a false claim that a court hearing had been held and a matter referred to a referee, is an incredible abuse of any legal system.

The bizarre conclusion of the federal appeals court that there was no deprivation of due process or equal protection can be regarded only as a misguided attempt, demeaning to that court, to sweep under the rug a matter it knows to be a shameful reflection on the judicial fraternity. (Note the Court gave no rationale and the one case it cited, not mentioned by any party, is totally irrelevant in that it concerned a claim to a seat in a state legislature, clearly not a right established and protected by the federal Constitution.)

The Chief Justice has criticized the performance of lawyers, and that criticism is well taken. Judges are lawyers, too, and where their conduct violates their own court rules, legal precedent, canons of judicial ethics, and common sense, they are subject to correction—or should be. If rhetoric is to be followed up by action, this case presents an ideal opportunity for this Court to demonstrate its expressed concern with the behavior and obligations of both lawyers and judges.

In *Steffel v. Thompson*, 415 U.S. 452 (1974) this Court reiterated its concern for due process for individuals; at p. 474:

> "The solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others."

In the same case, at p. 460, this Court said:

> ". . . state courts have the solemn responsibility, equally with the federal courts "to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . ." *Robb v. Connolly*, 111 U.S. 624, 637 (1884)."

Steffel was a unanimous decision with several opinions.

Constitutional rights are supposed to be available in civil cases as well as in criminal cases. This Court has shown concern for criminal defendants. Petitioner submits that where he is being deprived, and threatened with further deprivation, of both liberty and property in a so-called civil case (certainly a misnomer for divorce actions!) he is deserving of constitutional protection. This case is but one of many in which the judiciary, particularly at the state level, has shown a callous indifference to the federal Constitution. The lay public knows this as well as the legal profession—and this Court could use this case as an appropriate vehicle to remind all that the rule of law should prevail.

Due process is not defined in the Constitution, and there are no cases precisely in point—because it has been universally accepted that *a hearing will include both a unity of the tribunal and an on-going proceeding.* The cases do say that due process, at a minimum, requires that a meaningful opportunity to be heard be granted, *Boddie v. Connecticut,* 401 U.S. 371 (1971), at a meaningful time and in a meaningful manner, *Goldberg v. Kelly,* 397 U.S. 254 (1971), *Fuentes v. Shevin,* 407 U.S. 67 (1972). In *Morrissey v. Brewer,* 408 U.S. 471 (1972), the requirements for just a rudimentary hearing, in parole revocation cases, are enumerated, at p. 487—and even there it is assumed that the fact-finder will be the same throughout the hearing.

In the instant case the trial judge refused for months to do anything with the trial he had started; then he attempted to order a re-play; a second judge came along *without any authorization* and purported to hold a new trial, although there was no indication of just how far he intended to proceed; and then, in demonstrably dishonest fashion a claim is made that the "new trial" was instead a

"switching judges in midstream" of a single trial! If this is no constitutional deprivation, as the Sixth Circuit Court of Appeals has said, then surely due process no longer has any meaning.

4. The Sam Sheppard Case Demonstrates the Importance of Reviewing An Issue Previously Rejected.

In another Ohio case, Dr. Sam was convicted, by a court of common pleas, of murdering his wife. Appeals failed, and ultimately this Court denied his petition for certiorari. Years later, with much publicity and a flamboyant attorney, he sought a writ of habeas corpus. The federal district court granted the writ, but the court of appeals reversed. Then this Court, in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), *granted* the petition for certiorari, noting in its first footnote (p. 335) that it had previously refused it! The basic issue was precisely the same from the time of the original trial—namely, whether Sheppard had been given due process. This Court then held, 8-1, that he had been denied due process. Its opinion has also become a landmark in the area of free speech vs. fair trial, recently cited by this Court in the *Nebraska Press Ass'n* case (6-30-76).

The *Sheppard* saga of course raises some questions as to the consistency with which this Court applies its criteria for deciding on petitions, but those questions are primarily for internal discussion by the Court. What is significant here is that this Court did not foreclose consideration of due process for Sheppard even though it had previously rejected his petition—and he was eventually completely vindicated. Similarly, the Court ought to weigh heavily the implications of the instant case despite the prior denial of certiorari.

CONCLUSION

As the matter now stands, Ohio judges do not have to finish trials they undertake and can engage, without any reason or purpose, in repeated and unending "switching judges in midstream" of a trial.

Without a requirement that a judge complete a trial he undertakes, and without a requirement that the trier of fact be the same throughout and be present throughout the hearing, there is simply no coherent process, let alone due process, which can have validity or acceptance. This Court ought to grant the writ here sought in order to define the nature, role and duties of the fact-finder, to affirm the rule of law and to attempt to restore confidence in the legal profession.

Respectfully submitted,

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August, 1976

APPENDIX A

Order of the District Court

(Filed July 2, 1975)

Civil Action C 75-159 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ORWIN B. GRIFFIN, JR.,
Plaintiff,

v.

RICHARD V. ZURZ, etc. *et al.,*
Defendants.

ORDER

CONTIE, *J.*

Defendants have moved the Court to dismiss this action. As grounds for said motion, it is urged that the Court is without jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. As materials outside the pleadings have been presented to and considered by the Court, this motion will be considered as one for summary judgment. Upon consideration and for the reasons stated below, the motion shall be granted.

Plaintiff initiated this action for redress of alleged violations of his constitutional rights under 42 U.S.C. §1981 and §1983. Declaratory judgment, injunctive relief, and damages are sought.

As stated by the complaint, unless otherwise noted, the essential facts are as follows:

On April 3, 1970, a divorce action was initiated against plaintiff in the Court of Common Pleas of Summit County, Ohio. This action, hereinafter referred to as Case No. 282105, proceeded to trial before Judge Koledin on February 3, 1971. After five days of trial, but before its completion, Judge Koledin refused to continue. On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was therefore unable to continue the trial.

Although Judge Koledin was capable to continuing the trial by April of 1971, he never did. In the November 9, 1971 Order, Judge Koledin set the case for hearing before Judge Swaim on December 13, 1971 and "[set] aside the testimony that was heard in the five days of trial . . ."*

Plaintiff objected to Judge Swaim's continuing the case. Apparently when his objection was overruled, Judge Swaim continued the trial. The decision in the Appellate Court indicates that plaintiff, or his counsel, stipulated that the record of the first five days of trial should be considered by Judge Swaim. Plaintiff denies this. In any event, Judge Swaim rendered judgment against plaintiff in that case on October 27, 1972.

The complaint alleges that Swaim was not a Judge of any court at any time relevant herein. However, the Appellate Court, upon plaintiff's appeal, found that Judge Swaim was retired but had been assigned to Summit County as a Common Pleas Judge by the Chief Justice of the Supreme Court of Ohio. *Griffin v. Griffin*, Case No. 7129, Court of Appeals, Ninth District of Ohio (August

*On appeal, the Court of Appeals found that this action, i.e. the setting aside of the testimony heard by Judge Koledin, was of no legal effect. *Griffin v. Griffin*, Case No. 7129, Court of Appeals, Ninth District of Ohio (August 14, 1973).

14, 1973). The Court accepts this factual statement of the Appellate Court as true, as the Court finds that plaintiff is collaterally estopped from asserting that Swaim was not a Judge at the time, because this issue has been finally adjudicated against plaintiff in the Appellate Court. See *Coogan v. Cincinnati Bar Assn.*, 431 F.2d 1209 (6th Cir. 1970).

Before Judge Swaim entered judgment in the divorce case, he entered an Order dated August 4, 1971. Said entry ordered plaintiff committed to the Summit County Jail for ten (10) days, commencing on August 9, 1971. This entry was also signed by defendant Pike, as Referee for the Common Pleas Court of Summit County, Ohio. This entry recites that it resulted from a hearing on August 2, 1971, on the plaintiff in that action's motion for an Order finding plaintiff herein in contempt of court, and that plaintiff herein having appeared, the matter was referred to a Referee for hearing. Plaintiff alleges that these recitations are false.

Defendant Calhoun, the counsel for plaintiff's wife in the divorce action, allegedly prepared this entry as well as most of the other court orders for approval and signature by the judge.

The complaint alleges that the Order of Judge Swaim, issued on August 9, 1971, was not enforced for over three years, and that it was drafted and executed with knowledge of its illegality and for the purpose of intimidating plaintiff.

On January 28, 1975, another judgment was rendered in Case No. 282105, this time by defendant Judge Zurz. Plaintiff was therein ordered to pay his former wife $7,955.00. Judge Zurz also found that defendant had not served the ten days imprisonment ordered on August 4,

1971, and therefore issued a capias to the Sheriff of Summit County to apprehend and detain plaintiff for ten days. This Order was allegedly entered with knowledge that the judgment entered by Judge Swaim was void. It is further alleged that defendant was not served with a copy of this judgment entry until about March 14, 1975, and that such delay resulted from a deliberate attempt by Zurz and Calhoun to prejudice this plaintiff's rights.

It is alleged that all three defendants acted under a color of state law, and that they acted with malice towards plaintiff.

Plaintiff seeks a declaration that the judgment of January 28, 1975 is void, apparently for lack of jurisdiction; an injunction precluding Zurz or anyone acting under him from enforcing said judgment, and enjoining all defendants from further harassing plaintiff; and $1,000,000 in damages from each defendant.

As previously stated, plaintiff claims a cause of action upon these facts exists under 42 U.S.C. §1981. However, the complaint contains no allegation of racial discrimination. Accordingly, no cause of action exists under §1981. See *Abshire v. Chicago and Eastern Illinois Railroad Co.*, 352 F. Supp. 601 (1972). Summary judgment must therefore be granted defendants on plaintiff's §1981 claim.

Plaintiff's remaining federal claims arise under 42 U.S.C. §1983. Initially, the Court notes that said action may not be maintained against defendant Calhoun. Calhoun was an attorney in private practice, representing plaintiff's wife. While, if true, the allegations of the complaint would establish less than commendable behavior on his part throughout the divorce action, Calhoun's actions were not "under color of state law" as required by section 1983. See *Nelson v. Stratton*, 469 F.2d 1155 (5th Cir. 1972); *Szijarto v. Legeman*, 466 F.2d 864 (9th Cir. 1972); *Shelton v. Randolph*, 373 F. Supp. 448 (1974). Calhoun's actions in submitting the proposed orders to judges for their approval and signature does not constitute action under color of state law. Cf. *Schatte v. International Alliance, etc.*, 182 F.2d 158 (1950) *reh. den.* 183 F.2d 685, *cert. den.* 340 U.S. 827, 71 S. Ct. 64, *reh. den.* 340 U.S. 885, 71 S. Ct. 194. Accordingly summary judgment must be granted to Calhoun.

The next issue to be considered is the question of judicial immunity on the part of defendants Zurz and Pike. At all times relevant herein, Zurz was a Judge of the Court of Common Pleas of Summit County, Ohio. Defendant Pike was a referee of said court. Their actions in this matter were judicial in character.

Thus, if their actions were within the jurisdiction of the Court of Common Pleas, or if said actions were merely in excess of that jurisdiction, they are immune from an award of damages in this suit. See *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967). Only if they acted in the clear absence of all jurisdiction may they be so liable. *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972). Plaintiff argues that only Judge Koledin had jurisdiction to continue the trial commenced in February 1971 and that the judgment of Judge Swaim is therefore void. The argument continues that as no valid judgment had been rendered in Case No. 282105, defendant Judge Zurz' entry was in the clear absence of jurisdiction. Further, it is argued that defendant Pike's finding of August 4, 1971 Order, which Judge Swaim also signed, was in the clear absence of jurisdiction since only Judge Koledin had jurisdiction of his action as of that time. Thus, the basis for plaintiff's position is his assertion that only Judge Koledin had jurisdiction of his case.

In Ohio, as elsewhere, a distinction is drawn between a court and a judge. The court is "a tribunal organized for the purpose of administering justice," while the judge "is the officer who presides over that tribunal." 14 O. Jur. 2d, *Courts* §3. Jurisdiction over the divorce action was not vested in Judge Koledin *per se*, but in the Court of Common Pleas of Summit County, Ohio. It is clear that that court had jurisdiction of the divorce case at its inception. While Judge Koledin may have had a duty to continue a trial he began, the mere fact that a different judge concluded the trial does not divest the Court of Common Pleas of jurisdiction over said action. As Judge Swaim was appointed to said court and was exercising the powers thereof, his judgment is not void for lack of subject matter jurisdiction, but at most is voidable only. Therefore, the Judge Zurz action in rendering judgment upon Judge Swaim's judgment was not in the clear absence of jurisdiction and therefore he is immune from suit in this case.

The same result obtains as to Referee Pike. As his actions relative to the Order of August 4, 1971 were within the jurisdiction granted the Court of Common Pleas of Summit County, any mistakes contained therein were error merely; Referee Pike did not act in the absence of all jurisdiction. Therefore, Referee Pike is immune from liability and damages in this action.

The fact that defendants Zurz and Pike are immune from damages does not preclude injunctive or declaratory relief. However, as said relief would amount to a review of the state court's judgment, this Court is without authority to grant such relief. "Section 1983 should not be a device to make federal courts a forum for appeals from state court litigation." *Cochran v. Barbuto*, Civil Action No. C74-106 (N.D.Ohio 1974).

Accordingly, defendants' motion for summary judgment is hereby granted.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

APPENDIX B

Judgment Entry of the District Court

(Filed July 2, 1975)

Civil Action C 75-159 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ORWIN B. GRIFFIN, JR.,
Plaintiff,

v.

RICHARD V. ZURZ, etc. *et al.*,
Defendants.

JUDGMENT ENTRY

CONTIE, *J.*

The Court having granted defendants' motion for summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby granted to defendants and against plaintiff and this action is dismissed.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

APPENDIX C

Order of the Court of Appeals

(Filed April 15, 1976)

No. 75-2084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORWIN B. GRIFFIN, JR.,
Plaintiff-Appellant,

vs.

RICHARD V. ZURZ, individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Defendants-Appellees.

ORDER

BEFORE: PECK, McCREE, and ENGEL, *Circuit Judges*

Plaintiff appeals from an order granting summary judgment for defendants in an action for redress of alleged violations of constitutional rights under 42 U.S.C. §§ 1981 and 1983. The complaint sought a declaratory judgment, injunctive relief, and damages. The alleged constitutional deprivations stem from what the Ohio Court of Appeals determined to have been an irregular but harmless transfer of appellant's divorce case from one judge to another before its presentation on the merits had been completed.

Not every departure by a state from its established procedures constitutes a violation of due process of law and after a thorough examination of the record in this appeal, we determine that no constitutional deprivation occurred. Accordingly, the judgment is affirmed. *Cf. Snowden v. Hughes*, 321 U.S. 1 (1944).

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

Order of the Court of Appeals Denying Petition for Rehearing

(Filed May 27, 1976)

No. 75-2084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORWIN B. GRIFFIN, JR.,
Plaintiff-Appellant,

vs.

RICHARD V. ZURZ, *et al.*,
Defendants-Appellees.

ORDER

BEFORE: PECK, McCREE, and ENGEL, *Circuit Judges.*

The petition for rehearing with suggestion for a rehearing en banc having come on to be heard, and no judge

having requested a vote on the suggestion for en banc consideration, and the petition having therefore been referred to the panel that heard the case, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk